Anne v. David Lizards

49

[Lord Prestongrange Reporter. June 26, 1758.

Representatives of John Dickie

INFORMATION

Prestongrange FOR

Henry, *Anne*, and *David Lizars*, Children of the deceased *David Lizars*, Farmer in *Damhead*, Pursuers,

48

AGAINST

The Representatives of the deceased *John Dickie*, Writer to the Signet, Defenders.

DAVID LIZARS, Tenant in *Damhead*, died in *June* 1741, leaving *Isobel Anderson*, his Widow, and several Children. The Widow was confirmed Executrix to her deceased Husband; and as his Estate did principally consist of the Stocking of his Farm, the Management of which was necessary to be carried on, she did, in the Character of Executrix, continue the Administration for some time, for the Behoof of herself and her Children.

The Widow, during the Course of her Management, did convert most of her Husband's Estate into Money, which she lent upon different Securities, and, amongst others, did lend to *Thomas Hay*, *Archibald Punton*, and *George Begbie*, all Baxters in *Edinburgh*, the Sum of 2000 Merks, for which they, in *January* 1743, granted Bond, binding themselves, conjunctly and severally, to pay at *Whitsunday* then next, under the usual Penalty.

A In

In the Year 1741, it was thought proper, by the Friends of the Children, that their Part of their Father's Eſtate ſhould be put under a legal Management; and for this Purpoſe, an Application was made to the Court, praying, that a Factor might be appointed to them, *loco tutoris*, which your Lordſhips did accordingly, by naming to that Office, the deceaſed *John Dickie*, Writer to the Signet.

Mr. *Dickie* having accepted, by extracting his Act of Factory, did immediately enter upon the Adminiſtration. All the Papers and Grounds of Debt were delivered up to him by the Widow, and the Method he took for making up a judicial Inventary, was, to bring an Action againſt the Widow, for adjuſting her Accounts. This Action was a Thing concerted, and, as the common Doer of the Family, he had the Direction of it, upon the Part of the Widow alſo; but as he was poſſeſſed of all the Papers neceſſary for the Adminiſtration of the Childrens Affairs, he appears not to have been in any Haſte to finiſh this Action: For, although it was a Matter of Form, in obtaining the Sanction of the Court, to Accounts diſtinct and clear in themſelves, and with which he was well acquainted, yet the Action was not concluded till the Year 1746.

Mr. *Dickie*, in the Character given him by the Court, continued the Adminiſtration of the Childrens Affairs, till his Death, which happened in the Year 1754, after which, the Children, who in the Sequel ſhall be called Purſuers, brought an Action againſt his Repreſentatives, to account for his Intromiſſions with their Eſtate.

This Action came to be heard before Lord *Preſtongrange*, as Ordinary. The Defenders did exhibite an Account of Mr. *Dickie*'s Intromiſſions, in which, *inter alia*, they take Credit for the 2000 Merks lent to Meſſrs. *Hay*, *Punton*, and *Begbie*, with the whole Annualrents due upon the Bond, no Part thereof ever having been paid.

This

BRITISH MUSEUM

This Article was looked upon with Surprize, by the Purſuers, that their Money ſhould have been lent to theſe three Perſons, all in good Credit at the Time of the Loan, by their Mother, and that they ſhould all have been allowed to fail, one after another, without either the principal Sum, or any Part of the Annualrents having been recovered, or even any Diligence done for Recovery thereof.

For theſe Reaſons it was, that the Purſuers did object to this Article, and did contend, that ſo groſs and unuſual a Negligence in Mr. *Dickie*, muſt have the Effect of making the Debt his own, and that they were not bound to enquire after the Effects of the Debitors, but the Defenders behoved to pay the Money upon receiving a Conveyance to the Bond, and all Action competent againſt the Obligants therein; to the Payment of which Mr. *Dickie* was ſubjected, by the Act of Sederunt 1730, in conſequence of which he was appointed Factor.

The Lord Ordinary, upon adviſing the Objections to this, and other Articles of the Accounts, with Anſwers thereto, did pronounce an Interlocutor in the following Words, ſo far as reſpects the 2000 Merks: " Repels the third Objection, " unleſs the Purſuers alledge and inſtruct, that the other Cre- " ditors of *Archibald Punton*, *Thomas Hay*, and *George Begbie*, " recovered Payment, or obtained Preference on the Debi- " tors Effects, by uſing Diligence."

The Purſuers did ſubmit this Branch of the Interlocutor, with two other Articles of leſs Importance, to the Court, by Petition; upon hearing of which, your Lordſhips did remit the Cauſe ſimply to the Lord Ordinary, with Power to his Lordſhip to do therein as he ſhould ſee Cauſe.

When the Cauſe came again to be heard before the Lord Ordinary, the Purſuers were adviſed, in order to put the Matter beyond all Diſpute, to offer to prove the Credit of the Obligants in the Bond, at the Time of Mr. *Dickie*'s being appointed Factor, and of their having gradually failed, at ſuch

Diſtances

Diſtances of Time, as that the Money might even have been recovered from the laſt, who became Bankrupt, if Diligence had been done, or even a peremptory Demand made of the Money. And the Lord Ordinary having ordered a Condeſcendence of Facts to be given in, the Purſuers did give in a Condeſcendence, importing, That at the Date of the Bond, the three Obligants therein, were all in good Credit, and continued ſo down till the Year 1747, when *Hay* gave Way; that ſome time thereafter, *Punton* alſo gave Way, but that *Begbie* continued in good Credit down till the Year 1754, in ſo much as to have conſiderable Dealings, and to make his Payments regularly; ſo that there could have been little Difficulty in recovering the 2000 Merks, if Mr. *Dickie* had acted in the Manner, that every prudent Perſon would have done, upon ſuch Occaſion, when two of three Obligants in a Bond, had become Bankrupts.

Upon this a conjunct Probation was granted to both Parties, to be reported to the Lord Ordinary, and the Proof herewith given in being adduced by the Purſuers, which, with Minutes of Debate thereon, having been adviſed by his Lordſhip, he has been pleaſed to take the Cauſe to report upon Informations.

The Proof will be read by the Lords, it is ſhort, and unneceſſary to be minutely ſtated here, as it is believed it will not be contraverted, but that the Purſuers have proved the Subſtance of their Condeſcendence, to wit, That the Obligants in the Bond were in good Credit at the Date thereof; that *Hay* and *Punton* came only to fail, about the Years 1747 and 1748, and that *Begbie* continued to be in ſuch Credit, and to have ſo conſiderable Dealings, in the Way of his Trade, down till the 1754, that the Payment of 2000 Merks might eaſily have been recovered from him.

The firſt Witneſs, *James Logan*, depones, that he did uſually ſell to *Begbie* his Crop of Wheat, and even got Payment of the Crop of that Year wherein Mr. *Begbie* became Bankrupt.

Walter

Walter Forreſt ſays, that he had frequent Dealings with him, from *November* 1752, down till the Time of his Bankruptcy, that he conſidered him to be a Man in ſuch Circumſtances, as to have no Scruple of truſting him Wheat from 10 *l.* to 100 *l.* Value; and *Alexander Elliot* ſays, That he had conſiderable Dealings with him, alſo, down till the Time of his Bankruptcy, and found him always pretty regular in anſwering his Credit. The Period of the other two Obligants, their Bankruptcy, is pretty well aſcertained by the Oath of *Gavin Waugh*.

Such then being the Circumſtances of the Caſe, the Queſtion, for your Lordſhips Conſideration, is, Whether the Conduct of Mr. *Dickie*, in allowing thoſe People to become Bankrupt in the Way and Manner they did, without attempting to recover either the 2000 Merks, or any of the Annualrents that had become due thereon, was ſo faulty, as to ſubject him and his Repreſentatives to the Payment of the Money, leaving them to operate their Relief from the Debitors in the beſt Manner they can.

The Purſuers are adviſed, that Mr. *Dickie*'s Conduct muſt have that Effect, when judged of either agreeable to the Rules of common Law, or Words and Spirit of the Act of Sederunt 1730.

Factors by the Law of *Scotland* are bound to moſt exact Diligence, but whoever has the Management of the Eſtates of Infants, under whatſoever Character they may act, are certainly bound to take the ſame Care in their Affairs, as every reaſonable and prudent Perſon would be ſuppoſed to take in their own.

Now the Purſuers are in your Lorſhips Judgment, whether it can be ſuppoſed, that Mr. *Dickie* would have allowed the 2000 Merks to remain upon the Security of *Begbie* alone, for ſo long a Time after the Bankruptcy of the other two Obligants, when he had thought it neceſſary to take three Perſons, of good Credit, originally bound for the Debt? It is

 im-

impoſſible he would; and, in this Caſe, it has not been denied but he was in the Knowledge of the Bankruptcy of *Hay* and *Punton*, to the firſt of whom it has been admitted that he was a Truſtee for the Creditors.

When then Mr. *Dickie* found that the Purſuers, their Mother, had been ſo exact or ſecure as to inſiſt for having three Perſons bound for this Part of her Childrens Eſtate, muſt it not have occurred to him, when he found that two of the three Debitors had become bankrupt, that it was a reaſonable Act of Adminiſtration that he ſhould either have got Payment of the Money from the third, or an additional Security for Payment thereof, ſo that the Eſtate under his Adminiſtration, might remain in the ſame good Condition it was when he entered upon it? It certainly muſt; and yet no ſuch Step was taken, nay not ſo much as a ſingle Year's Annualrent paid for ſo many Years. This, of itſelf, would have been ſufficient to have rouzed the Attention of a provident Man, but created an indiſpenſible Duty upon every Perſon, acting for another, to have called up the Money, although no Bankruptcy had occurred in the Debitors, and lent it out upon a more proper Security, by which he might have recovered the annual Profits of the Purſuers, their Eſtate, which was ſcarcely ſufficient to anſwer their annual Expence, a Circumſtance that highly aggravates Mr. *Dickie*'s Miſconduct in this Caſe.

Tutors and Curators, by the Law of *Scotland*, are bound *præſtare culpam levem*, and there can be little Doubt, but, if Mr. *Dickie* had been acting in either of thoſe Characters, he would have been ſubjected to the making this Debt effectual to the Purſuers. Inſtances of this Sort are to be ſeen in the Dictionary, Page 241; and, if ſuch is the Law with reſpect to Tutors and Curators, who have only a gratuitous Office, *multo magis*, muſt it hold in the preſent Caſe; as Mr. *Dickie* acted in the Character of a Factor, and had a ſuitable Reward, for the Trouble, he ſhould be put to in the Purſuers their Affairs,

fairs, and therefore, both in Law and Juſtice, was bound to the moſt exact Diligence.

The good Character, Mr. *Dickie* bore, makes it difficult to imagine, what could have been the Motives of his Conduct; the Apology offered for him before the Lord Ordinary, was, that he muſt have conſidered *Begbie*'s ſimple Security, after the Bankruptcy of the other two Obligants, as ſufficiently good.

But this could not poſſibly be the Caſe, for although *Begbie* is proved to be a Man in good Credit, and from whom Payments could be eaſily recovered, yet his Credit, by the Proof, is entirely confined to Merchants and others, from whom he was in uſe of purchaſing Wheat, by the Sale of which, they were to reap an Advantage, and who it is notour, on that Account, are never ſo ſcrupulous in giving Credit, as when lending Money upon a permanent Security, where no Advantage is to be got but the legal Intereſt. None of the Witneſſes have ſaid, that *Begbie* was a Perſon to whom they would have lent 2000 Merks upon his ſimple Security; Mr. *Forreſt* does not even carry his Credit ſo far, in the Way of Merchandize, and indeed there is nothing better underſtood, than that a Perſon, as a Dealer, may be in very good Credit, and make regular Payments, and yet be a very improper Perſon to lend Money to, upon their ſimple Security.

It has been ſaid in this Caſe, that it is a ſtrange Doctrine to maintain, that although *Begbie* was in ſuch Credit as to be truſted with Bargains of Wheat, yet that he ought not to be truſted with 2000 Merks upon a permanent Security.

But the Purſuers cannot conſider this as a ſtrange Doctrine, nor to be attended with fatal Conſequences to the Trade of the Country, as has, and probably will be pled for the Defenders. The giving of Credit in the Way of Commerce becomes neceſſary in every trading Country, but the lending of Money upon laſting Securities to Merchants has never been underſtood to be attended with the beſt of Conſequences, as

it

From these Words it is plain, that it is esteemed to be the Duty of a Factor, *loco tutoris*, to do Diligence for the Recovery of Annualrents, if they are not regularly paid; and it follows, as a Consequence, that it must also be his Duty to do Diligence for the Recovery of the Principal, if Annualrents are not at all paid: And this more especially, when there is Reason to suspect the Circumstances of any of the Debitors.

In the Part of the Dictionary, already quoted, it appears to have been adjudged, that, if a Tutor does not do Diligence against his Pupil's Debitors, when *vergentes ad inopiam*, he, by the Neglect, takes the Debt upon himself, and becomes liable therefor to his Pupil.

Now the present Case falls directly within the Principles of these Decisions; for here were the Debitors *vergentes ad inopiam*, in the most proper Sense of the Words, as the Obligants in the Bond failed at different Periods; and therefore, whenever the Security became lessened, by the Bankruptcy of one, it became Mr. *Dickie*'s Duty to do Diligence against the rest.

In answer to the Argument, arising from the Act of Sederunt, it was pled, that, as such Factors were appointed by the Court, in place of Tutors, they were only liable to account in the same Manner as Tutors themselves; and therefore, that the Act could only relate to the Rents and Profits of Lands, but not to the Annualrents of Money, Tutors being bound to stock out the first upon Annualrent, within a certain Time, but the last only once, during their Office; and it was further said, that if such was not to be the Construction of the Act, Factors, *loco tutoris*, would be obliged to call for the Annualrents of Money annually, the Consequence of which would be, their having the principal Sums thrown into their Hands.

But the Pursuers are advised, that these Answers are by no means satisfying; for, although it be true, that these Factors are commonly termed Factors *loco tutoris*, because of their being most usually appointed by the Court to Pupils who have not Tutors, yet it is not to be from thence inferred, that they are only bound to the same Rules of Management, and enjoy

enjoy the ſame Privileges as Tutors: The Inſtructions given them by the Act of Sederunt prove the contrary. And indeed it is reaſonable that they ſhould be bound to more exact Diligence, becauſe their Office is lucrative, and that of a Tutor altogether unprofitable; and therefore, as the Words of the Act of Sederunt are ſufficiently broad to comprehend the Annualrents of Money, as well as the Rent of Lands, ſo there can be no good Reaſon, why there ſhould be a Diſtinction made between the one and the other.

And, as to the ſuppoſed Inconveniency of Factors being obliged to call for the Intereſt of Money annually, there is no ſuch Inconvenience or Obligation ariſes from the obtempering the Act of Sederunt; for the Act only bears, that ſuch Factors ſhall be liable for the Annualrents of all Rents and Profits, from and after the Space of one Year of their *becoming due*.

Now Annualrents become due *de die in diem*, and the Terms of their Payment have come to be regulated by Cuſtom, which formerly was once in the Year, but of late, being only once in the two Years, when Money is lent at five *per cent.* ſo the Obligation upon the Factor by the Act of Sederunt is, only to ſtock out, or they themſelves to be liable for the Intereſt of the Profits of Money, after the Space of one Year of its becoming due; that is, after two Years Annualrent are due, he has a third to look out for a proper Security, upon which to lend the Money.

Upon the whole, it is believed, that few Caſes have, or can well occur, where the Negligence of a Factor can, with greater Propriety, be made the Foundation of ſubjecting him to the Damage, accruing, by his Negligence, to thoſe he is appointed Factor for: And therefore, it is not doubted, but the Lords will be of Opinion, that the Defenders cannot have Credit for either the 2000 Merks, or Annualrents thereof; but as the Repreſentatives of Mr. *Dickie*, they fall to be charged therewith, as if Payment of the Money had been recovered by them.

In reſpect whereof, &c.

JA. MONTGOMERY.

27. Nov^r 1760

President. Doubtful. Mr Dickie an honest man. but he acted as Tutor. who is liable in Lata Culpa; sometimes in levem Culpam. the money Lent on totable precarious. Alemore a Tutor liable in exact diligence; some Lords factors more liable. Dickie culpable & liable. Coalston of the same opinion. mentioned the case of Grame of Methy

Kames. the strong fact is: his neither acting in interest for so long nor doing diligence.

The Lords The finds the Representatives liable & remit to the Ordinary.

BRITISH LIBRARY

J.A. MONTGOMERY.